

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



ORIGINAL **75-6037**

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

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HANNA B. WAKIM,

*Plaintiff-Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

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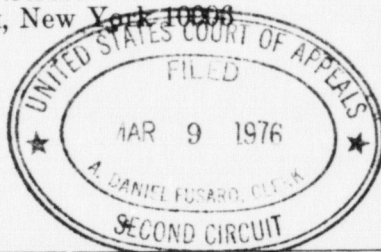
**PETITION ON BEHALF OF DEFENDANT-APPELLEE**  
**UNITED STATES OF AMERICA FOR REHEARING AND**  
**SUGGESTION FOR REHEARING EN BANC**

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## **PETITION ON BEHALF OF DEFENDANT-APPELLEE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

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### **Preliminary Statement**

This petition is submitted by defendant-appellee United States of America for rehearing and suggestion for rehearing en banc pursuant to Rule 40 of the Federal Rules of Appellate Procedure as supplemented by Rule 40 by the Rules of the United States Court of Appeals for the Second Circuit.

This petition seeks a rehearing of the decree of this Court rendered and entered on February 25, 1976, following oral argument on February 20, 1976, which vacated the judgment of the United States District Court, Southern District of New York, (United States District Judge Gus Solomon) as follows:

“This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

"ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is vacated, and the case is remanded to the district court with instructions to (1) reopen the proceedings to allow introduction into evidence of the hospital records relied on by plaintiff and such other evidence as the district court may consider appropriate, and (2) make new findings of fact and conclusions of law based upon the expanded record."

This application for rehearing is directed towards the first issue decided by the Court, namely, that the case be reopened to allow introduction into evidence of the hospital records relied upon by plaintiff and such other evidence as the District Court may consider appropriate.

The basis for the requested rehearing is that the hospital records were marked as Exhibit A in the proceedings in the District Court and there was no demonstration by the plaintiff or a finding by this Court that the District Court's finding of facts are clearly erroneous.

### POINT I

**The Hospital Records Were in Evidence as Exhibit A and Were Before the District Court at the Trial. The Decree of this Court Should be Corrected Accordingly.**

At the inception of the trial, the hospital records relied upon by the plaintiff were marked as the Plaintiff's Exhibit A and they were received in evidence.

The plaintiff, at page 4 of his brief, states:

"During the trial, various exhibits, including hospital records, were deemed to be received in evidence."



The joint appendix filed with the Court include excerpts from the hospital records at pages 124, 132, 138. Exhibit A are the records of the United States Marine Hospital, Staten Island, New York, the only hospital where the plaintiff received inpatient and outpatient care in the United States. There is no evidence in the record of the existence of any other hospital records which plaintiff offered or which were marked in evidence and to which plaintiff refers in his brief to the District Court and to this Court.

## POINT II

### **Upon the Corrected Judgment of this Court, the Judgment of the District Court Should be Affirmed.**

The foundation of this Court's decree is the Court's incorrect finding that the hospital records pertaining to plaintiff's treatment are not in evidence. A correction of the finding that the records are in evidence, when considered with other findings of the District Court, requires this Court to affirm the judgment of the lower court.

Upon argument, Mr. Justice Oakes stated that if the trial judge had read the hospital entry that plaintiff gave a history of slipping while going to lookout and injuring his right ankle and upper back (106), that might have influenced the judge to make a fact finding that the plaintiff's injury occurred onboard instead of ashore. Plaintiff's post-trial brief submitted to the lower court called that entry to the attention of the trial judge at pages 4 and 7. At page 4, the brief states:

"When he first reported to the United States Public Health Service Hospital, Staten Island, two days later, he gave a history of slipping while going to lookout and injuring his right ankle and upper back . . ."

It is evident that the trial judge gave no weight to that statement as he had a right to do as a finder of facts.

Dr. Howard Balensweig, defendant's orthopedist, and Dr. Mauer, plaintiff's orthopedist, read the complete hospital records before testifying (A100-A101, A85). Dr. Balensweig examined plaintiff on two occasions, May 1974 and October 1974 (A100) and read the October 29, 1970 report of examination of plaintiff by his father, Dr. Irvin Balensweig (A85, A96). Dr. Howard Balensweig stated that plaintiff suffered from functional disorders and that whether plaintiff was injured ashore or aboard the vessel, either could account for plaintiff's functional complaints (A96, A99, A110). Dr. Mauer also stated that the accident ashore or aboard could account for plaintiff's injuries (A82), but what caused him to say that the injuries were the result of a shipboard accident was that he believed plaintiff (A83). The trial judge was not required to and did not believe plaintiff or Dr. Mauer. His finding of facts were that plaintiff was injured ashore and that plaintiff's complaints were functional and not organic. The trial judge also participated in the questioning of the medical experts (A76-79; A81-86; A96-A110; A108; A110; A112) and permitted Mr. Mauer to lend assistance to plaintiff's attorney in cross-examining Dr. Howard Balensweig (A101). For further particulars on the medical issues, the Court is respectfully referred to Appellee's Brief, pages 9-14.

It is submitted that in all the circumstances the relief granted to plaintiff is not supported by demonstrable error on the part of the trial judge.



# CONCLUSION

The petition for rehearing should be granted and the relief heretofore prayed for allowed, or in the alternative, this matter be heard en banc.

Respectfully submitted,

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EDWIN K. REID  
on the Petition

Due and timely service of *Two* copies  
of the within *PETITION* is hereby  
admitted this *9TH* day of *MARCH* 1976

.....  
Attorney for *APPELLANT*

**COPY RECEIVED**  
**PAUL C. MATTHEWS**

*3/9/76*  
*GD*